**AW YONG WAI CHOO**

**v.**

**ARIEF TRADING SDN BHD & ANOR**

HIGH COURT MALAYA, IPOH
JAMES FOONG J
[CIVIL SUIT NO: 22-753-1982]
20 DECEMBER 2000

***CIVIL PROCEDURE:*** *Costs - Getting-up fee - Consolidation of actions - Whether getting-up fee must be confined only to points raised at hearing of consolidated action - Whether costs for getting-up should be repeated in each individual case in the consolidated action*

***CIVIL PROCEDURE:*** *Action - Consolidation of actions - Common facts and law and relief claimed - Same transaction or series of transactions - Whether a single action including all plaintiffs would have been more appropriate*

The High Court at Ipoh handed down a decision in favour of the plaintiffs against the 1st and 2nd defendants. It was appealed upon by the 2nd defendant but was dismissed by the then Supreme Court. Upon this, the plaintiffs filed their bill of cost to be taxed for the case heard in the first instance. Initially the deputy registrar taxed the bill of cost at RM49,642. On review made subsequently, he increased it to RM65,895. Dissatisfied with this decision, both the plaintiffs and the 2nd defendant applied respectively to review the taxation of the deputy registrar.

**Held:**

**[1a]** When there is a consolidation of cases for the purpose of economising time and effort then correspondingly the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It should not be repeated to each of the consolidated cases otherwise there would be a multiplicity of awards for the same amount of work and effort spent.

**[1b]** It would be unfair to punish the defeated party by awarding cost for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others.

**[1c]** No greater effort was expanded on looking up the same point of law which was applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions.

**[2]** There was no necessity for the plaintiffs to file so many suits. The 36 cases involve common facts and law with relief and rights claimed arising out of the same transaction or series of transactions. A single action to include all the plaintiffs would have been more appropriate and economical from the very beginning.

*[Both applications dismissed with no orders as to costs.]*

**Case(s) referred to:**
*Harbin v. Masterman [1896] Ch D 351* ***(refd)***
*Mucklow v. Whitehead & Openshaw v. The Same [1854] ] Ex 97* ***(refd)***
*United Malayan Banking Corporation Bhd v. Indah Sejati Sdn Bhd [1992] 1 AMR 41* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 59

**Other source(s) referred to:**
*Halsbury's Laws of England,* 4th edn, vol 37, p 60

**JUDGMENT**

**James Foong J:**

**Introduction**

On 21 September 1991 the High Court at Ipoh handed down a decision in favour of the plaintiffs against the 1st and 2nd defendants. It was appealed upon by the 2nd defendant but was dismissed by the then Supreme Court. Upon this, the plaintiffs filed their bill of cost to be taxed for the case heard in the first instance (the cost for the appeal having been settled at RM15,000 against the 2nd defendant). Initially the deputy registrar taxed the bill of cost at RM49,642. On review made subsequently, he increased it to RM65,895. Dissatisfied with this decision, both the plaintiffs and the 2nd defendant applied to me by way of encls. 53 (plaintiffs' application) and 55 (2nd defendant's application) respectively to review the taxation of the deputy registrar.

**Issue**

Not unlike most cases seeking review on the amount of taxed cost the item in dispute centres on the sum awarded for getting up. In the plaintiffs' bill of cost it is listed as RM170,000. But this was initially taxed down to RM30,000. On review, the deputy registrar increased this item to RM50,000. Despite this, both parties are of the view that this latter figure is not reasonable and justified; the plaintiffs asserting that it is – too low, and the 2nd defendant – too high.

**The Plaintiffs' Argument**

Mr. Yau, counsel for the plaintiffs at the outset impressed upon me that the bill of cost in question involves 36 suits which were only consolidated just before the commencement of *via voce* evidence from the first witness. The case, he explains involves the plaintiffs as purchasers of houses under respective sale and purchase agreements entered by them individually with the 1st defendant. When the 1st defendant failed to complete the houses, the 2nd defendant, who was the registered owner of the land where the houses were suppose to be erected, completed the project but charged the plaintiffs for a higher purchase price claiming that more superior quality materials than those specified in the sale and purchase agreements were used. This was resisted by the plaintiffs and when all negotiations for a settlement failed, the plaintiffs instituted 36 separate actions, all claiming, *inter alia*, for specified performance of their respective contracts. The 2nd defendant denied liability and advanced the following defences: the 2nd defendant was not a party to the sale and purchase agreements; the sale and purchase agreements were unenforceable for failing to comply with certain provision of the Housing Developers (Control & Licensing) Rules; and the 2nd defendant completed the houses out of a social and moral duty and at the request of the plaintiffs. All these were rejected by the trial judge, Justice Peh (as he then was), who gave judgment for the plaintiffs with cost.

Upon these facts, Mr. Yau agues that the deputy registrar should not confine the plaintiffs' claim for getting up to only one suit, but to all the 36 cases. And allotting a sum of RM5,000 for getting up fees to each case, the total amount would be RM180,000. Thus the figure of RM170,000 inserted in the plaintiffs' bill of cost for getting up is not substantial. To support this proposition he cited the established case of *Mucklow v. Whitehead, & Openshaw v. The Same* [1854] Ex. 97 where facts were these:

Two plaintiffs, Mucklow and Openshaw suffered distinct injuries caused by the busting of a boiler belonging to the same owner brought separate actions to recover damages against the same defendant. Both the plaintiffs employed the same attorney and their claims were to a certain extent similar. When they submitted their bills of cost to be taxe upon being successful with their claims, the Taxing Master refused to taxed each bill separately. On review to the Court of Exchequer, Pollock C.B. declares:

> In these cases rules *nisi* were obtained to review the taxation of the Master, which had been made on principle that there had been the same attention and care expended or labour bestowed in preparing the briefs, the same attorney being concerned for the plaintiffs in both cases. We certainly are very desirous, if it were possible, to make any arrangement that would be productive of economy in the administration of justice; but upon considering the case with

> the greatest attention, we find it impossible to lay down any rule that shall lead to that, without creating more litigation and more expense in discussing the application of it than, probably, money would be saved by the adoption of any such rule; and we are of the opinion, that where the business is actually done the Master ought not to take into consideration that the same attorney was employed by two parties, **unless there is a consolidation. If there is a consolidation, that may make all the difference**; but, if the business is really done, although there are two causes, and the same attorney be employed by both parties, we think that there is no ground for reducing the ordinary and fair charge which an attorney may make against his client in each case. (emphasis added)

Though there was a consolidation of these 36 cases, Mr. Yau stresses that the consolidation was made at a very late stage when all preparatory work, including getting up for each case, had been completed. Surely for this, the plaintiffs are entitled to be considered individually for their suits.

**2nd Defendant's Argument**

Mr. Devadason, counsel for the 2nd defendant, firstly disagrees with the views advanced by Mr. Yau. He reminds this court of the consolidation which he claims, effectively, reduced all 36 cases into 1. When this occurred, getting up must be confined to only one case otherwise there will be a multiplicity of cost. He is of the view that though disbursement must be paid for each case getting up must be restricted to only one. He then proceeds to add that the plaintiffs should, in the first place, not have filed so many suits. They could have combined their claims into one action since the defendants are the same and the causes of action arose out similar circumstances. By pursuing their claims separately the plaintiffs had incurred unnecessary cost and in accordance to the principle as laid down in the case of *Harbin v. Masterman* [1896] Ch. D. 351 only one set of cost was awarded against the appellant where several respondents with the same interest engaged separate solicitors to defend them in an administrative action.

On the 2nd defendant own request to review the deputy registrar decision of increasing the getting up from RM30,000 to RM50,000, Mr. Devadason points out that such sum handed down does not justify what was argued at trial where no new and novel points of law were advanced and no fresh proposition of law expounded.

**Analysis**

Justice Peh's decision is reported in the Current Law Journal under the citation: [1991] 3 CLJ 2834. At the commencement of his judgment the following are recorded:

> Before evidence *vice voce* commenced, the court discussed with all counsel and with their commendable co-operation made a consent order, *inter alia*, (a) that all 36 cases be consolidated forthwith; (b) that one only of the 36 plaintiffs need give evidence for the time being as the evidence for all other plaintiffs, who would have given similar evidence; and (c) that any other witness may, if necessary, be called, examined and cross-examined. The consent order was of course to save valuable time. The object is believed to have been achieved.

Evidently, the learned judge was attempting to save time, cost and effort. This is very much in line with the objective of consolidation as laid down in *Halsbury's Laws of England*, 4th edn, vol. 37 where at p. 60 it states:

> The main purpose of consolidation is therefore to save cost, time and effort, and to make the conduct of several actions more convenient by treating them as one action.

When there is a consolidation of cases for the purpose of economising time and effort then correspondingly the cost for getting up must be reduced and confined to only points of law and matters raised at the hearing of the consolidated cases. It should not be repeated to each of the consolidated cases otherwise there would be a multiplicity of awards for the same amount of work and effort spent. This, I believe, is the rational of Pollock CB in *Mucklow v. Whitehead, & Openshaw v. The Same (supra*) where a distinct exception to awarding separate cost for two actions where the subject matter litigated is substantially similar where there "is a consolidation". When such an event (consolidation) has occurred the work involved in looking up and researching on the law must be confined only to matters raised at the hearing of the case. It would be unfair to punish a defeated party by awarding cost for getting up in each of the consolidated cases when matters were heard only at one hearing; no greater amount of work and effort were expanded on others.

Admitting that though this may be logical, Mr. Yau has explained that the consolidation in this case was only effected at the last minute, just before the trial began. By then, all necessary preparation on researching the law had been completed for each case. I find this argument is without justification. Firstly, as illustrated above, no greater effort was expanded on looking up the same point of law which was applicable to all the cases since the relief claimed by all plaintiffs were similar and arose out of the same transaction or series of transactions.

Secondly, I agree with Mr Devadason that there was, in the first place, no necessity for the plaintiffs to file so many suits. The 36 cases involve common facts and law with relief and rights claimed arising out of the same transaction or series of transactions. A single action to include all the plaintiffs would have been more appropriate and economical from the very beginning. Though

the Rules of High Court provides for either the plaintiffs or the defendants to apply for consolidation at any time before the trial, failure on the part of the defendants to do so until it was initiated by the judge just before trial began should not be converted as a punishment to the 2nd defendants to pay out cost for the looking up the law for each case, otherwise the plaintiffs could unjustly benefit from the situation to secure more cost than necessary without putting in any extra effort.

As for the 2nd defendant's request to review the deputy registrar decision for awarding the sum of RM50,000 for getting up as being too excessive, I find no merits in the grounds so advanced. The learned deputy registrar had taken into consideration all factors as set out under part X of s. 1(2) of Appendix 1 under O. 59 of the Rules of High Court (RHC) in arriving at this figure with emphasis on the particular the value of the entire subject matter – approximately RM2.2 million. This is very much in line with what is elaborated in *United Malayan Banking Corporation Berhad v. Indah Sejati Sdn Bhd* [1992] 1 AMR 41 where "due consideration must be given to this amount of the subject matter when determining the getting up cost."

**Conclusion**

By reasons aforesaid I hereby confirm the deputy registrar certificate of cost and make no amendments thereto. There shall be no cost to either party in these two applications before me.